***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

# 76 1251
# 76 1252

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Appellant

-against-

JOHN MAURO and JOHN FUSCO

Appellees

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BRIEF FOR THE APPELLEE JOHN FUSCO

JOHN C. CORBETT
Attorney for Appellee JOHN FUSCO
Office and P.O. Address
66 Court Street
Brooklyn, New York 11201

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## PRELIMINARY STATEMENT

This is a consolidated appeal in which the United States appeals from two orders of HON. JOHN R. BARTELS, Judge of the United States District Court for the Eastern District of New York entered on May 17, 1976 as to JOHN MAURO and on May 19, 1976 as to JOHN FUSCO, dismissing separate indictments as against both defendants for failure of the Government to comply with Article IV (e) of the Interstate Agreement on Detainers (Title 18, United States Code, Appendix).

The appelle JOHN FUSCO contends that where, as a state prisoner serving time in an institution of the State of New York, he had been produced before the United States District Court for the Eastern District of New York on December 2, 1975, a trial date set, and then returned to the state institution by the Government without trying him, that Article IV (e) of the Interstate Agreement on Detainers required that the indictment be dismissed.

## STATEMENT OF THE CASE

An indictment was filed in the Eastern District of New York on November 3, 1975, charging the appellee JOHN FUSCO with criminal contempt of Court in violation of Title 18 U.S.C. Section 401. JOHN FUSCO had refused to testify before a federal Grand Jury sitting in the Eastern District of New York after having been granted immunity. When the indictment was handed down against

JOHN FUSCO he was an inmate of a state prison in the State of New York serving a sentence of one year to life on a narcotics conviction.

On November 5, 1975 the Government procured the issuance of a writ of habeas corpus ad prosequandum, and pursuant to that writ JOHN FUSCO was brought from his place of confinement in Dannemora, New York, and arraigned on the indictment on November 24, 1975, pleading not guilty. A status report was scheduled for December 2, 1975, and on that date FUSCO'S trial was scheduled for February 4, 1976.

JUDGE BARTELS then directed the return of FUSCO to state custody. (GA 70-71) The Assistant United States Attorney made no objection and FUSCO was returned to Dannemora. The trial was not held on February 4, 1976 due to the illness of JUDGE BARTELS.

On March 2, 1976, the Government procured the issuance of a writ of habeas corpus ad prosequandum for FUSCO who was scheduled to be produced on April 29, 1976 in the Eastern District. Prior to this appearance a motion was made to dismiss the indictment on the ground that the Government had failed to follow Article IV (e) of the Interstate Agreement and had returned FUSCO to state custody without having tried him on the federal indictment for which he had been produced in the Eastern District.

On May 19, 1976 JUDGE BARTELS ordered the indictment against FUSCO dismissed on the ground that the Government had violated Article IV (e) of the Interstate Agreement when it returned FUSCO to Dannemora on or about

December 3, 1975, or shortly thereafter before trying him on the federal indictment for which he had been brought before the Court.

## POINT I

### WHERE A STATE HAS ADOPTED THE INTERSTATE AGREEMENT ON DETAINERS THE RIGHTS OF ANY PRISONER OBTAINED BY THE FEDERAL COURTS FROM THAT STATE FOR TRIAL ARE CONTROLLED BY THE TERMS OF THE INTERSTATE AGREEMENT

This appealle was obtained by the Government by a writ of habeas corpus ad prosequandum and not by the filing of a detainer under the Agreement. It may be assumed that the United States Attorney securing this writ was unaware of the terms of the Agreement and followed the old method used prior to the adoption by the United States of the Agreement following Smith v. Hooey, 393 U.S. 374 (1969). In order to obtain FUSCO for trial the filing of the writ was unnecessary, but as the writ is provided for by Section 2241 sub-paragraph (c) (5), United States Code, the state of New York was bound to honor the writ and send FUSCO to the Eastern District in compliance with it. However, the existence and use of the writ of habeas corpus as prosequandum does not allow the Government to use it as a means of defeating and avoiding the terms of the Agreement.

The writ of habeas corpus ad prosequandum is still on the statute books because the states of Alabama, Alaska, Mississippi and Oklahoma have never adopted the Agreement, and to obtain a prisoner in one of their institutions for trial the use of such a writ would be mandatory. However it was not left on the books

to provide the Government with a back door to use in avoiding its obligations as and adopting state under the Agreement.

The purpose of the Agreement, which was adopted in its entirety by the United States without modification in Title 18 United States Code, Appendix, is set forth in Article I as follows:

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

The Agreement was adopted to eliminate the problem where a defendant was incarcerated in one jurisdiction with an indictment or charge in another hanging over his head and awaiting his release by the confining jurisdiction to receive and try him on the second indictment. As JUDGE BARTELS said in his decision (G.A. 6), a sword of Damocles was thus suspended over the head of the defendant, with the resultant adverse psychological effect of denying the incarcerated defendant probation or parole, and effectively impeding any efforts to rehabilitate him. United States ex rel Esola v. Groomes, 520 F 2d 830, 836-7 (3rd Cir. 1975)

United States v. Cappucci 342 F. Supp. 790 (E.D. Pa. 1972; 116 Cong. Rec. 14000 (1970).

When the United States adopted this Agreement without modification, Article I became a legislative statement of the policy of the Government as to this situation. What the appellant's brief is arguing on this point is that the Congress of the United States in adopting the Agreement intended that the writ of habeas corpus ad prosequandum could be used to negate the terms of the Agreement any time the Government so desired. However, we must look to the text of the Agreement itself to determine the intent of Congress and nowhere does the Agreement state that the United States does not have to follow it if the prosecutor finds it inconvenient or desires to avoid its terms.

As was said heretofore, 18 United States Code 2441, was left on the statute books because certain states did not adopt the Agreement and in those cases a writ of habeas corpus ad prosequandum would be necessary. The appellant's brief devotes much space to the history of this writ going back to the 18th Century. There is no dispute as to the authenticity of a writ of habeas corpus ad prosequandum or its necessity and validity in the past. But on the passage of the Agreement the writ has become unnecessary for the production of prisoners from a state institution where the state has also adopted the Agreement.

Where the Government does not follow the procedures set forth in the Agreement, as in this case, it is nevertheless bound by the terms of the Agreement.

## POINT II

## THE UNITED STATES ADOPTED THE AGREEMENT IN ITS ENTIRETY AND NOT SOLELY AS A SENDING STATE

The Interstate Agreement was adopted by the United States in its entirety without modification. The Government's brief argues that where the federal government desires the presence of a state prisoner, a writ of habeas corpus ad prosequandum should be the means used and thus the Agreement does not apply. When a state wishes to obtain a federal prisoner, the Agreement applies. The Government then asserts that the passage of the Agreement by Congress was only to assist the states.

Nowhere in the Agreement as passed by Congress, either in the text or the prefatory enabling portions is there any indication that the United States was only to be a limited participant. The United States entered into the Agreement on the same terms as the various states which had adopted it. By the text, the United States is a "state" and Artide II (a) defines a "state" as being:

> "A State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico."

Article II (c) defines a "receiving state" as a "State in which trial is to be had on an indictment, information, or complaint pursuant to Article III or Article IV hereof." The Congress did not alter or modify the Agreement in any way to state that the United States would not be a receiving state. The United

States has been so treated for the purpose of an Article III request by a state prisoner for trial on federal charges. United States v. Mason, 372 F. Supp. 651 (N.D. Ohio 1973).

The legislative background does not alter this conclusion. The Senate Report shows that Congress wished to assist states in their efforts to obtain federal prisoners for state trials. This report states that "the agreement shall enter into full force and effect as to a party 'State' when such State has enacted it into law". 3 U.S. Code Cong. & Adm. News 4864, 4866 (1970). In the legislative history Congress does not state that obligations of the United States shall be any less or different from the obligations of the other States which were parties to this agreement.

JUDGE BARTELS in his decision quotes from a letter from Graham W. Watt, Assistant Commissioner of the District of Columbia, date March 2, 1970, to Congressman Emanuel Celler, then Chairman of the Committee on the Judiciary, which is included in the legislative history, reading as follows:

> "H.R. 6951, if passed, will also enable the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party State made available for disposition of such detainer"

3 U.S. Code Cong. & Adm. News 4869 (1970). Certainly this statement indicates that the United States would be participating in the Agreement as both a receiving and a sending state.

As a practical matter in Section 3201 a) of the Criminal Justice Reform Act of 1975 (commonly referred to as "S-1") introduced in the Senate on January 15, 1975 and never passed, there is a provision in the cited section limiting the participation of the United States in the Agreement solely as a "sending state". In other words, it is recognized that the full participation as mandated under the existing law might cause a problem to the Government and it is desired to amend the Agreement. It is recognized that the existing law makes the United States both a "sending" and a "receiving state".

## POINT III

## THE FACT THAT FUSCO EXPRESSED A WISH TO RETURN TO STATE CONFINEMENT DID NOT OPERATE AS A WAIVER OF HIS RIGHTS UNDER THE INTERSTATE AGREEMENT

On December 2, 1975, when trial dates were fixed, FUSCO expressed a desire to return to his place of state confinement after the Court had stated that he and the other defendants could not stay in the Federal Detention Center. However, at no time was he asked by the Court if he expressly waived his right to be tried before being returned to state confinement.

Nor, was there any indication that he knew that such a right existed. On G.A. p. 70, the Court stated that he couldn't stay from "December to March 17th". The matter was decided as to the fact that all the defendants, including FUSCO, had to return to their state places of confinement.

One of the other defendant,s through his counsel, asked if it were

possible that he could remain in federal custody until the beginning of January, a period of several weeks. (G.A. p. 73) The Court then answered "I'm not going to do it. The answer is I give you a week before they come to trial." (G.A. pp. 73-74) Thus the matter was decided and all FUSCO wished was to be returned at once, rather than delay another week or two.

As there is no evidence that FUSCO knew he had such a right, or that the Court made inquiry as to whether he was waiving that right, the fact that he did not object to being returned did not operate as a waiver.

## CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT DISMISSING THE INDICTMENT SHOULD BE AFFIRMED

Respectfully submitted,

JOHN C. CORBETT,
attorney for appellee
JOHN FUSCO

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U. S. ATTORNEY

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Jaramore